ADVISORY RULING

The Responsibility of Property Owners to Pay for Water and Sewer Charges under the STATE SANITARY CODE

This is an advisory ruling issued pursuant to M.G.L. c. 30A, §8. The Department of Public Health has been asked to clarify the responsibility of owners of residential property to pay for water and sewer charges under Chapter II of the State Sanitary Code, 105 CMR 410.000, Minimum Standards of Fitness for Human Habitation. This advisory ruling affirms and supersedes an earlier informal advisory opinion on the same subject issued on May 2, 1988.

I. A Property Owner is Responsible for Providing and Paying for Water and Sewer Service in a Rental Dwelling Unit.

The Sanitary Code in 105 CMR 410.180 requires in pertinent part that:

> The owner shall provide for the occupant of every dwelling, dwelling unit, and rooming unit a supply of water sufficient in quantity and pressure to meet the ordinary needs of the occupant, connected with the public water supply system, or with any other source that the board of health has determined does not endanger the health of any potential user.

Section 410.300 of the Code requires that:

> The owner shall provide each dwelling with a sanitary drainage system connected to the public sewerage system, [or a means of sewage disposal which complies with Title 5 of the State Environmental Code].

The Department interprets the word "provide" as used in these sections to mean to supply and to pay for. The State Sanitary Code, Chapter II, has many sections which require the owner of a dwelling to "provide" services. Although the Code does not always explicitly state that the owner must pay for these services, it is obvious from the context that a service cannot be provided unless the owner pays for the service (or, more accurately, unless the cost of the service is included in the rent).

The Code specifies those situations in which the cost of a service or item may be passed on to the tenant. For example, 105 CMR 410.100 states:

> The owner shall provide within this [kitchen] space:
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> (1) A kitchen sink . . .
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> (2) a stove and oven in good repair . . . except and to the extent the occupant is required to do so under a written letting agreement; and
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> (3) space and proper facilities for the installation of a refrigerator.

It is clear that the tenant is not expected to pay money in addition to that paid for rent in order to be provided with a kitchen sink or space for a refrigerator. However, this section of the Code does allow the cost of providing a stove to be shifted to the tenant if the obligation is contained in a written letting agreement. Similarly, certain other sections of the Code allow payments to be shifted to tenants under specific circumstances: 105 CMR 410.190 (owner must provide, i.e. pay for, the facilities for heating hot water but tenant can be required to pay for fuel under a written letting agreement);[1] 105 CMR 410.200 and 410.201 (owner must provide heating facilities but tenant can be required to pay for fuel under a written letting agreement); 105 CMR 410.354(A) (owner must provide and pay for electricity and gas unless the dwelling unit is separately metered and the rental agreement provides for payment by the tenant). See also Young v. Patukonis, 24 Mass. App. Ct. 907 (1987).

Neither section 4.10.180 nor 410.300 requiring the owner to provide water and sewer services contains language allowing the tenant to pay for these services under a written letting agreement or otherwise. Therefore, the owner must pay for water and sewer services and these costs must not be separate from any other services required to be provided as part of the agreed upon rent.

II. Under the Sanitary Code, An Agreement Between a Landlord and Tenant Under Which the Tenant is Required to Pay for Water and Sewer Service Separately from Rent is Void and Unenforceable.

Because the Sanitary Code explicitly requires the payment of water and sewer service charges by owners of residential property, any agreement between an owner and tenant under which the tenant would be required to pay separately for water and sewer service is

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[1]When the Department of the Attorney General is informed that a landlord is requiring tenants themselves to rent hot water heaters in violation of this provision of the Code, it sends the landlord a letter requesting him to voluntarily discontinue the practice, and threatening suit if he does not.

void and unenforceable. This conclusion flows from statutory and case law, as well as important public health policy considerations.

Water and sewer services are basic attributes of a dwelling unit essential to the health of the occupants. In the Sanitary Code, the Department has made the determination that public health considerations require the owner to supply every dwelling unit with water and sewer services, just as the owner must supply a kitchen sink (pursuant to 105 CMR 410.100) and toilet facilities (pursuant to 105 CMR 410.150). In a Memorandum and Order dated July 18, 1988 in the case of Moore v. Lynn Water and Sewer Commission, Federal District Court No. 88-1266-S, the court recognized the Department of Public Health's concern. The court stated:

> The Department of Public Health can rationally view water as essential to minimally sanitary occupancy of a dwelling, and can rationally conclude that the provision of water to every dwelling unit can be most effectively ensured by requiring property owners to provide it. Since the regulation has a rational basis, it is not unconstitutional. Memorandum and order at 3-4.

Under statute and case law, it is axiomatic that the protections of the Sanitary Code may not be waived by agreement between a landlord and tenant. M.G.L. c. 111, §127K; Boston Housing Authority v. Hemingway, 363 Mass. 184, 199 (1973) ; Leardi v. Brown, 394 Mass. 151 (1985) ; McKenna v. Begin, 3 Mass. App. Ct. 168 (1971); Young v. Patukonis, 24 Mass. App. Ct. 907 (1987); Lezberg v. Rogers, 27 Mass. App. Ct. 1158 (1989). In the Leardi case, the court found a violation of the consumer protection law, M.G.L. c. 93A, because the standard lease used by the landlord contained language under which tenants waived rights guaranteed by the Sanitary Code and the implied warranty of habitability, even though the plaintiffs conceded that the landlord had never enforced these provisions. In Young v. Patukonis, the court declined to enforce an oral agreement between the tenant and landlord which contravened the Sanitary Code. And in Lezberg v. Rogers, the court refused to enforce an agreement contained in the lease which required the tenant to pay for "separately metered" electricity, when in fact the dwelling unit was not separately metered as required by the Sanitary Code.[2]

The Moore case does not alter the conclusion that owner/tenant agreements requiring tenants to pay for water and sewer services are prohibited. In that case, the plaintiff tenant brought suit against the Lynn Water and Sewer Commission and the Department of Public Health. He challenged the section of the Code requiring property owners to provide water for tenants, 105 CMR 410.180, as a denial of

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[2]As noted above, the Code specifically allows payment for electricity to be shifted to tenants when the lease so provides and the premises are separately metered. 105 CMR 410.354(A). Such is not the case for water and sewer services.

his right to equal protection of the laws under the Fourteenth Amendment to the U. S. Constitution. As discussed above, the court found that the Department of Public Health regulation requiring the landlord to provide water was rational and dismissed the Department from the case. (Memorandum and Order dated July 18, 1988.)

Subsequently, the plaintiff proceeded against the Lynn Water and Sewer Commission, challenging the regulation as applied to himself. In a Memorandum and Order dated November 14, 1988, the court ordered the Lynn Water and Sewer Commission to provide water and sewer services to the plaintiff, on the basis that denial of such service to a tenant would be a violation of the equal protection clause and state law.[3] Since, at this juncture in this case, the tenant and landlord did not dispute between themselves the responsibility for providing water, and since the Department had already been dismissed from the case, no party raised the legality of the owner/tenant agreement and the court was not called upon to consider it. Had such an argument been made and had the Department's policy considerations described above been articulated, the case might well have been decided differently. Furthermore, the court's conclusion that the City of Lynn was required to sell water services to a tenant does not imply that it is lawful for an owner to force or even encourage a tenant to agree to purchase water directly in the first place. As the Massachusetts Legislature and courts have recognized, a prohibition against all landlord/tenant agreements which violate the Sanitary Code, whether they be incorporated in a written lease or otherwise, is the best means to ensure compliance with the Code.

III. Conclusions

1. Under the State Sanitary Code, Chapter II, the property owner is responsible for providing and paying for water and sewer services furnished to rental units.

2. The State Sanitary Code, Chapter II, prohibits agreements between property owners and tenants under which tenants are required to pay separately for water and sewer services.

Copies of this advisory ruling will be forwarded to interested parties.

FOR THE DEPARTMENT OF PUBLIC HEALTH

Donna E. Levin
General Counsel

Date 7/3/90

[3]The state statutes and case law cited by the court in support of its order did not address the question of the legality of an owner/tenant agreement with respect to the provision of water.

COMMONWEALTH OF MASSACHUSETTS

NORTHEAST HOUSING COURT

JEFFREY M. LURIE
Plaintiff
- v.-
LLOYD B. THOMPSON et al
Defendant

No.92-SC-00037

DECISION

At issue in this small claim is $234.32 unpaid portion of a water bill, and $117.76 portion paid by the tenants which they seek to recover in counterclaim.

Under Section 13 of a written Single Family Dwelling Lease for $1,800.00 monthly rental of a single-family home in Marblehead, the tenant agreed to pay all utilities including water.

The tenant now contends that under the Department of Public Health, State Sanitary Code, 105 C.M.R. §410.180, as interpreted by the General Counsel's Advisory Ruling dated July 3, 1990, the cost of water service, even where separately metered, cannot be passed onto the tenant even by written agreement, and that any such agreement is void and unenforceable.

This and other provisions of the Code serve the common and important public health and safety purpose of protecting occupants of rental housing against ambiguity in their lease arrangements, thus to prevent sudden shut-offs of water, §410.180, hot water, §410.190, heating fuel, §410.201, and electric and gas utilities, §410.354(A):

> The owner shall provide and pay for the electricity and gas used in each dwelling unit unless [utilities are separately metered] and the rental agreement provides for payment by the occupant. 105 C.M.R. §410.354(A).
>
> The owner shall supply heat except and to the extent the occupant is required to supply the fuel under a written letting agreement. §410.201.
>
> The owner shall supply the hot water unless and to the extent the occupant is required to provide fuel under a written letting agreement. §410.190.
>
> The owner shall provide water. §410.180.[1]/

But the Department of Public Health also takes the position that water and sewer services are basic attributes of a dwelling unit essential to the health of the occupants, and that the Code requires the owner of rental property to supply every dwelling unit with water and sewer services, just as the owner must supply a kitchen sink, §410.100 and toilet facilities, §410.150. General Counsel's Advisory Ruling dated July 3, 1990, p.3, quoting Moore v. Lynn Water and Sewer Commission, No.88-1266-S (Skinner, J. July 18, 1988), pp.3-4.

The conclusion reached by General Counsel's Advisory Ruling is not immediately obvious, because the Department might, but does not, use the words "provide and pay for" in Section 410.180 with respect to water service, as it does in Section 410.354(A) with respect to electricity and gas utilities.

Agencies cannot substitute aggressive interpretation for the rule-making process required by the Administrative Procedures Act, Gen.L. c.30A. Finkelstein v. Board of Registry of Optometry, 370 Mass. 476, 478, 349 N.E.2d 346, 348 (1976); Cleary v. Cardullo's, Inc., 347 Mass. 337, 344, 198 N.E.2d 281, 286-287 (1964).

1/ The provisions of the State Sanitary Code cannot be waived. Gen.L. c.111 §127K. Boston Housing Authority v. Hemingway, 363 Mass. 184, 199, 293 N.E.2d 831, 843 (1973).

Thus, oral agreements that occupants pay utility bills, which are not in compliance with the State Sanitary Code because they are not in writing, cannot be enforced. Young v. Patukonis, 24 Mass.App. 907, 908-909, 506 N.E.2d 1164, 1166 (1987)(rescript); Sclamo v. Shea, 29 Mass.App. 1113 (1990) (Rule 1:28 decision). Lezberg v. Rogers, 27 Mass.App. 1158, 539 N.E.2d 89 (1989)(rescript).

I and other trial judges have criticized the harshness of the hard-and-fast requirement of a written agreement. Palermo v.Tenerini, Bos.Hsg.Ct. No.90-SP-55630 (Kerman, J. September 19, 1991), fn.3; Gilmore v. LaFreniere, Ham.Hsg.Ct. No.88-SP-7406-WS (Abrashkin, J. November 1, 1988), pp.6-7. And see, Bernadin v. Andre, Bos.Hsg.Ct. No.89-SP-47332 (Craven, J. May 18, 1989); Clifford v. Hall, Bos.Hsg. Ct. No.90-SP-54885 (Daher, Ch.J. May 17, 1990); Sclamo v. Shea, Wor. Hsg.Ct. No.89-SP-00122 (Martin, J. November 15, 1989), rev'd 29 Mass. App. 1113 (1990)(Rule 1:28 decision).

I have suggested that the Department of Public Health consider amending its rule, to permit enforcement of oral agreements proved by clear and convincing evidence. Palermo v. Tenerini, Bos.Hsg.Ct. No. 90-SP-55630 (September 19, 1991). See for example, Gen.L. c.186 §18 and c.239 §2A (rebuttable presumptions of retaliation).

Agency interpretations are not conclusive, and courts are bound to exercise their own judgment when construing the meaning of administrative regulations. Finkelstein v. Board of Registry of Optometry, 370 Mass. 476, 478, 349 N.E.2d 346, 348 (1976).

But an administrative agency has considerable leeway in interpreting a statute it is charged with enforcing. Consolidated Cigar Corp. v. Department of Public Health, 372 Mass. 844, 850, 364 N.E.2D 1202, 1209-1210 (1977).

And an agency's interpretation as to the meaning of its own regulations is entitled to considerable deference by the courts. Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 782-783, 407 N.E.2d 297, 310 (1980). See generally, A.J. Cella, Administrative Law and Practice (M. P. S. 1986), §§747-749.

I cannot say that General Counsel's interpretation of the regulatory language is unfounded, or that her construction of the regulation is unreasonable.

Nor can I say that the regulation itself lacks a rational basis, or that the Department exceeds proper health and safety purposes.

Although the question is a close one, and although I believe that the Department's public health and safety purposes could, and should, be accomplished by excepting from its rule written lease arrangements for separately metered water of single family dwellings, the Department, through its General Counsel, clearly chooses not to do so.

I hold, therefore, that the tenants cannot be held liable for the $234.32 unpaid portion of the water bill, and that they may recover back the $117.76 portion of the water bill previously paid.

I also find that the tenants are entitled to recover $77.50 on their counterclaim for out-of-pocket expense for carpet-cleaning, which was necessary to make the premises habitable at the beginning of the tenancy.

I further find that the plaintiff-landlord fails to sustain his burden of proving that the tenants committed waste to the premises beyond normal wear and tear.

Judgment for the defendant-tenants for $195.26 total damages**,** payable within 30 days under Small Claim Rule 7(d).

David D. Kerman
Associate Justice

May 28, 1992